

consistent in its current position that it is not requesting interconnection pursuant to §251(c), so that questions about its real intent and the completeness of its disclosure to the TRA and this Commission remain unanswered.¹² The Commission must not compromise the TRA's authority -- or interfere with its duty -- to terminate Tennessee Telephone's rural exemption only if the requested interconnection is "not unduly economically burdensome, is technically feasible and is consistent with [the 1996 Act's universal service mandates]."

Ordering the TRA to grant Hyperion's application would also be improper because the TRA is not bound to accept the terms Hyperion proposes. For example, Hyperion claims (Pet. at 22) an unqualified right to the interconnection required of all LECs by §251(b) of the Act.¹³ However, §251(f)(2) explicitly authorizes state authorities to modify or suspend those requirements for any carrier serving fewer than 2% of the nation's access lines in the aggregate nationwide to the extent it finds necessary "(i) to avoid a significant adverse economic impact on users of telecommunications services generally; (ii) to avoid imposing a requirement that is unduly economically burdensome; or (iii) to avoid imposing a requirement that is technically infeasible," as long as modification or suspension is "consistent with the public interest,

¹² Its October 13, 1997 letter (attached hereto as Appendix A) demonstrates that Hyperion, in fact, made an earlier request for full subsection 251 interconnection, apparently disclaimed to avoid scrutiny in connection with preemption, which casts grave doubt upon its hollow insistence now that it does not "at this time" seek to terminate Tennessee Telephone's §251(f) rural exemption.

¹³ As noted earlier, Hyperion proclaims in its Brief to the TRA (p. 2) and its Petition (p.3) that it "expect[s] ... that all competing LECs would abide by the obligations imposed on all local exchange carriers under Sections 251(a) ... and 251(b) ... of the 1996 Act.

convenience, and necessity.” The Commission’s actions here must not prejudice or undermine the application of that standard if a future request raises the issue.

In short, the standards for terminating an exemption or granting suspension or modification include, in effect, the same reasons the TRA provided for denial under §253(b) of Hyperion’s application to enlarge its service area into territory served by a rural telephone company. Any decision to preempt the TRA’s Denial Order in this context must not deliberately or inadvertently detract from the state’s ability to exercise and enforce its authority under §251(f)(1) and (2) or §253(f) by any broad holding that all state actions that discourage or prevent entry by a competitor are preempted.

V. CONCLUSION

The Commission plays a delicate Constitutional role on behalf of Congress when it decides whether and to what extent to preempt state laws or decisions under its delegated authority. The facts and circumstances of the TRA’s denial of Hyperion’s application to expand its service area to serve customers in Tennessee Telephone’s service area deserves strict Commission adherence to the preemption requirements and exceptions Congress placed in its hands by enacting §253. The TRA’s determination that the deferral of rural competition falls within the exception to the bar against barriers to competition comports with the legal standard for the consumer safeguard powers Congress left to the states in §253(b). It cannot reasonably be faulted for insufficient competitive neutrality without jettisoning Congress’s balanced effort to reserve authority for states to protect their citizens from competition that threatens the universal

service support flows that keep rates affordable and promote rural infrastructure development. The TRA justified its disposition of Hyperion's application, especially in light of the debilitating current uncertainty about the extent of, state universal service responsibilities, which is significantly different than was the situation when the preemptive actions Hyperion relies upon were decided. The Commission should not preempt the TRA Denial Order.

Even apart from the validity of the TRA's Denial Order, the Commission should not preempt the underlying state law, since the statute provides states the opportunity to justify their application and interpretation of the law on the basis of particular facts in case-by-case proceedings. And there is no basis for ruling in advance that the law is a violation of section 253(a) regardless, for example, of particular applications of the exceptions in §253(b), (c) and (f).

Finally, even if the TRA Denial Order and §65-4-201(d) were properly subject to preemption, the Commission should not order the grant of Hyperion's application or dictate the

terms of any authorization, since restraint is more in keeping with the statutory limitation of preemption to the minimum necessary. The Commission should not limit Tennessee's ability to consider the full range of consumer safeguards left available to it by the 1996 Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Victoria C. Kim, a secretary in the offices of Koteen & Naftalin, hereby certify that true copies of the foregoing TDS TELECOM's Comments on Hyperion of Tennessee's Petition for Preemption, have been served on the parties listed below, via first class mail, postage prepaid on the 13th day of July, 1998.

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